(1)

Supreme Court, U.S.
FILED

05-257 JUN 15 2005

OFFICE OF THE CLERK

NO. _____

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 2004

ROBERT A. BURKICH,)
Petitioner)
VS.)
)
UNITED STATES OF AMERICA,)
Respondent)

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

ROBERT A. BURKICH
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PETITIONER, pro se

QUESTIONS PRESENTED

I

WHEATHER THE SIXTH CIRCUIT COURT OF APPEALS AND THE U.S. DISTRICT COURT BELOW ERRANTLY DENIED THE CERTIFICATE OF APPEALABILITY (COA) WITHOUT AN INDIVIDUALIZED DETERMINATION OF THE CONSTITUTIONAL MERITS OF ALL CLAIMS ARISING FROM OUTRAGEOUS AND TERRORISTIC GOVERNMENTAL CONDUCT WHERE A CAREER CRIMINAL, ACTING AS A U.S. GOVERNMENT AGENT AND POSING AS A MAFIA "HIT MAN," MADE UNDISPUTED AND DOCUMENTED DEATH-THREATS AGAINST AND UNSUSPECTING PHYSICIAN, HIS WIFE, CHILDREN AND BUSINESS PARTNER TO ENTRAP THE DOCTOR IN A MAIL-FRAUD SCHEME?

II

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT BELOW ARBITRATILY SUBVERTED THE EXPRESS WILL OF CONGRESS AND THE MANDATES OF THE U.S. SUPREME COURT, TO DENY THE COA BY CREATING AN ABSOULTE, PROCEDURAL TIME-BAR TO CONSTITUTIONAL CLAIMS ACTIVELY CONCEALED FROM THE PETITIONER BY HIS CONFLICTED AND INEFFECTIVE COUNSEL AND ONLY DISCOVERABLE THROUGH MERE FORTUITY?

III

WHETHER THE SIXTH CIRCUIT COURT OF APPEALS AND THE DISTRICT COURT BELOW ERRANTLY DENIED THE PETITIONER'S ALTERNATIVE PLEA THAT HIS CLAIMS BE COUNTENANCED UNDER RULE 60 (b) AND THE WRIT OF CORAM NOBIS?

TABLE OF CONTENTS

	PAGES
DECISIONS BELOW.....	1
JURISDICTION.....	1
CONSTITUTIONAL AND STATUTORY PROVISIONS.....	1-3
STATEMENT OF THE CASE.....	3-8
ARGUMENTS:	
I	
INDENYING THE CERTIFICATE OF APPEAL-ABILITY (COA) WITHOUT CONDUCTING AN EVIDENTIARY HEARING AND/OR MAKING AN INDIVIDUALIZED DETERMINATION OF THE CONSTITUTIONAL MERITS OF EACH CLAIM PRESENTED, THE DISTRICT COURT BELOW AND THE SIXTH CIRCUIT COURT OF APPEALS ENTERED INTO CONFLICT WITH THE HOLDINGS OF THE OTHER CIRCUITS AND THE SIXTH CIRCUIT COURT'S OWN HOLDINGS.....	8,15

TABLE OF CONTENTS (cont)..... PAGES

ARGUMENTS:

II

IN DEYING THE COA WITHOUT CONSIDING THE VALID STATUTORY EXCEPTION THAT THE EXISTENCE OF MERITORIOUS CONSTITUTIONAL CLAIMS WERE ACTIVE-LY CONCEALED FROM THE PETITIONER BY HIS CONFLICTED ATTORNEY, THE DISTRICT COURT BELOW AND THE SIXTH CIRCUIT COURT OF APPEALS ARBITRARILY CREATED AN ABSOLUTE PROCEDURAL TIME-BAR TO SAID CLAIMS, CONTRARY TO THE EXPRESS WILL OF CONGRESS AND THE MANDATES OF THE U.S. SUPREME COURT..... 15-17

III

PREJUDICIAL ERROR OBTAINED FROM THE FAILURE OF THE DISCTRICT COURT OF APPEALS TO ENTERTAIN PETITONER'S PLEA THAT HIS CONSTITUTIONAL CLAIMS BE COUNTENANCED UNDER F.R.C.P., RULE 60 (b),, AND A WRIT OF CORAM NOBIS..... 17,18

CONCLUSION..... 18

TABLE OF CITED AUTHORITIES

PAGES

Amadeo v. Zant,
486 U.S. 214 (1988) 16,17

Arrendondo v. United States,
178 F. 3d 778 (6th Cir. 1999) 11

Banks v. Dretke,
12 S. Ct. 1256 (2004) 13

Barefoot v. Estelle,
463 U.S. 880 (1983) 9

Beasley v. United States,
491 F.2d 687 (6th Cir. 1974) 10, 11, 12

Bounds v. Smith,
97 S.Ct. 1491 (1977) 11

Boykin v. Alabama,
89 S. Ct. 1709 (1969) 14

Cuyler v. Sullivan,
446 U.S. 335 (1980) 11, 13, 17

Finch v. Vaughn,
67 F.3d 909 (11th Cir. 1999) 11

AUTHORITIES: (continued) PAGES

Harris v. Carter,
337 F.3d 758 (6th Cir. 2003) 13

Hill v. Lockhart,
477 U.S. 52 (1985)..... 11

Jacobson v. United States,
503 U.S. 540 (1992) 9,10,14

Jamison v. Collins,
291 F.3d 380 (6th Cir. 203.3) 16

McCarthy v. United States,
394 U.S. 459 (1969) 14

Miller-El v. Cockrell,
537 U.S. 322 (2003) 15

Murphy v. Ohio,
263 F.3d 466 (6th Cir. 2001) 8, 14

Murray v. Carrier,
447 U.S. 479, 496 (1986)..... 16

AUTHORITIES: (continued) PAGES

Sherman v. United States,
56 U.S. 369 (1958) 9,10, 13

Slack v. McDaniel,
529 U.S. 473, 120 (2000) 9, 15

Sorrells v. United States,
356 U.S. 369 (1958) 9,10, 14

Strickland v. Washington,
104 S.Ct. 2052 (1984) 10, 11, 12, 17

United States v. Bogart,
783 F.2d 1428 (9th Cir. 1986) 15

United States v. Cronic,
466 U.S. 648 (1984) 11

United States v. Hall,
200 F.3d 962 (6th Cir. 2000) 13

United States v. Morgan,
346 U.S. 502 (1954) 18

United States v. Valencia,
541 F.2d 518 (6th Cir. 1976) 15

AUTHORITIES: (continued) PAGES

Von Molthe v. Gilles,
68 S.Ct. 316 (1948) 12

F.R.C.P., Rule 59 (b) 3

F.R.C.P., Rule 60 (b) 2,3, 7,8,17,18

Fed.Rules Crim.Proc., Rule 11 14

Tennessee Law, § 39-11-504 (a) 10

Tennessee Law, § 39-11-505 10

28 U.S.C. § 1254..... 1

28 U.S.C. § 2244 ..... 2, 16, 17

28 U.S.C. § 2254 ..... 2, 8, 17

28 U.S.C. § 2255 ..... 1, 2, 7, 16, 17

U.S. Constitution, Amend. V 1, 2, 10

U.S. Constitution, Amend, VI 1, 2

DECISIONS BELOW

A copy of the November 23, 2004 Order of the Sixth Circuit Court of Appeals, denying Petitioner's application for a Certificate of Appealability (COA), is attached at Appendix A; the March 18, 2005 Order of the Sixth Circuit Court of Appeals denying a petition for rehearing en banc is attached at Appendix B; the August 6, 2004 Memorandum and Order of the United States District Court dismissing the § 2255 petition, etc., as untimely are not reported; a copy of same is attached at Appendix C.

JURISDICTION

The Order of the Sixth Circuit Court of Appeals denying a COA as being untimely was entered November 23, 2004. A petition for rehearing en banc was subsequently denied on March 18, 2005. Jurisdiction for the petition for writ of certiorari is conferred pursuant to 28 U.S.C., § 1254 (1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves Amendments V and VI of the Constitution of the United States, guaranteeing, respectively, due process and Assistance of Counsel for defense:

AMENDMENT V

> No person shall be... deprived of life, liberty, or property, without due process of law.

AMENDMENT VI

> In all criminal prosecution, the accused shall... have the Assistance of Counsel for his defense.

The provisions of Amendments V and VI are enforced, in pertinent part, by 28 U.S.C. § 2255:

Rule 1.

> These rules govern the procedure in the district court on a motion under 28 U.S.C. § 2255:
>
> (1) by a person in custody pursuant to a judgment of that court for a determination that the judgment was imposed in violation of the Constitution or laws of the United States...

The provisions of Amendments V and VI are enforced, in pertinent part, by 28 U.S.C. § 2244, as it applies with equal force to §§ 2254 and 2255:

SECTION 2244 (d) (1)

> (A) 1-year period of limitation...shall run from the latest of –
>
> (B) The date on which the factual predicate of the claim or Claims presented could have been discovered through the exercise of due diligence.

The provisions of Amendments V and VI are further enforced by F.R.C.P., Rule 60:

RULE 60 (b)

> On motion and upon such terms as are just, the court my relieve a party or a party's legal representative from

a final judgment, order, or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59 (b); (3) fraud, (whether heretofore denominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment.

STATEMENT OF THE CASE

The Petitioner, Dr. Robert Alexander Burkich, MD, was a quiet, dedicated, physician with no criminal record nor criminal association when he was mistakenly targeted for an auto-theft scheme because he was believed to be the high-profile owner of a popular, local club (th Web Site) and a 1997 Corvette. The Government's auto-theft and insurance scam was focusing on Corvettes, and the Petitioner regularly drove the 1997 Corvette belonging to his business partner.[1]

In or around October of 2000, a Mr. Mac Heard was referred to the Petitioner, Mr. Heard was a convicted felon with a lengthy criminal history and was working as a

[1] The Web Site was actually owned by the Petitioner's father, Dr. Alexander Nicholas Burkich, DDS, while the 1997 Corvette was owned by the Petitioner's business partner, Fred Bayne

Confidential Informant (CI) for Federal law-enforcement authorities.

Within a week of his initial appointment, CI Heard began proposing to the Petitioner an insurance scheme for "getting rid of" the '97 Corvette. The Petitioner made it clear that he didn't own the car he was driving and that he was not interested in Heard's proposal. CI Heard, however, continued to pressure the Petitioner over a period of some five (5) months or more. Over that period too, Heard became increasingly aggressive. See Petitioner's affidavit at Appendix F.

Repeatedly Heard confronted the Petitioner at his office or at his father's club, telling him to "give up the car."

Heard also began making threatening calls to the Petitioner's home, asking the Petitioner "do you like waking up in the morning to the life you have?"

CI Heard openly bragged about being a killer, informing Dr. Burkich (Petitioner) that he and a friend (unknown to the Petitioner) were "hit men" for "the Mafia" and telling him they "kill people for a living."[2]

---

[2] The death-threats made by Heard against the Petitioner and others were heard by numerous witnesses, several of whom have tendered affidavits in support of this Petitioner's motion to vacate, etc. See the affidavits of Dr. Robert A. Burkich, Appendix F; Catherine A. Burkich, Appendix G; Dr. David Z. Evdokimow, MD, Appendix H; William Dilbeck, Jr., Appendix I; Darren Webb, Appendix J; Woodrow F. Brank, Appendix K. Moreover, the Court is asked to take judicial notice that, in the Government's transcription of a March 26, 2001 conversation with the Petitioner (Appendix L, p. 3 at line 12), CI Heard openly threatened to kill Fred Bayne, the owner of the Corvette, if Bayne did not turn the insurance check over to him.

On at least one occasion that he visited the clinic, CI Heard was accompanied by his wife. Thereafter, CI Heard began openly accusing the Petitioner of having an affair with his (Heard's) wife. Still, the Petitioner strenuously resisted all CI Heard's efforts to draw him into criminal conduct until March of 2001 when CI Heard and an unknown associate paid a late-night visit to the Burkich home where the Petitioner's wife was alone with their young children. The Petitioner was away in Nashville with a colleague (Dr. David Z. Evdokimow). See Appendix F, G, H and I.

Thoroughly intoxicated, CI Heard began hurling threats and accusations, telling Mrs. Burkich that her husband was in a local motel with his (Heard's) wife. Appendix F, G and H.

Mrs. Burkich's terrified phone call to her husband convinced the Petitioner that he could no longer expose his wife, his children and himself to the grave danger that Heard represented. Upon returning home on the following day, the Petitioner agreed to surrender the Corvette. Appendix F.

Although the facts of this case were fully made known to the Petitioner's attorney, Hon. Jerry Summers, the Petitioner had no idea of any real or potential conflict. It was not until subsequent to meeting former Police Officer William Dilbeck, Jr., in or around May of 2004, that the Petitioner learned of the long relationship between Attorney Summers and the Government's star witness, CI Heard.

Attorney Summers concealed from the Petitioner the facts of his long-standing relationship with the Government's

principal agent, that he had served as CI Heard's attorney over many years, and that Heard was receiving specific, favorable considerations from the Government for implicating and securing a conviction of the Petitioner.

Attorney Summers failed to explore, assert or preserve for appeal the Petitioner's only viable defenses – duress, compulsion and entrapment. Rather, errantly advising the Petitioner that he was "guilty" simply by having performed the act of mail fraud, Attorney Summers urged the Petitioner to change his plea – although he secured no plea agreement.

The Petitioner has stated by affidavit that neither his attorney nor the District Court explained to him that, under the factual and legal circumstances peculiar to this case, his submission to Government-sponsored enticements and terroristic threats directed against himself and his significant others constituted no crime and that had he been so advised he would never had changed his plea. Appendix F, at par. 18.

Judgment was entered against the Petitioner on April 2, 2002 and the Petitioner was sentenced to one (1) year probation and the forteiture of specific rights as a U.S. citizen. The Petitioner was also subjected to a fine, required to remain in his employment, required to continue providing for his family and instructed not to leave his employment without ten (10) days notice. Appendix D.

Neither Petitioner's attorney nor the District Court apprised him that the fact of his Federal conviction, standing alone, could subject him to State prosecution and forfeiture of his medical license and praetice. Appendix F, at par. 19.

Subsequent to the instant Federal judgment, the Petitioner was prosecuted by State medical authorities and stripped of his license to practice medicine in the State of Georgia and the State of Tennessee.

Although Attorney Summers initially represented the Petitioner in his fight to keep his medical license, the Petitioner was eventually forced to seek other counsel. And, it was during the process of the Petitioner's fight to keep his medical practice alive, that he was introduced to former Police Officer William Dilbeck, Jr., and learned from Dilbeck of Attorney Summers's lengthy and conflicting relationship with Heard, the Government's chief agent. Appendix F and I.

After discussing these revelations with a number of attorneys and others knowledgeable in legal matters, the Petitioner also learned that Attorney Summers had errantly advised him that his (Petitioner's) actions made him "guilty" of Mail Fraud notwithstanding the fact that he (Petitioner) had succumbed to violent threats by Government agents.

The Petitioner, on July 12, 2004, and within two (2) months if his meeting former Police Officer William Dilbeck, Jr., filed his "Motion to vacate, Set Aside or Correct Sentence Pursuant to 28 U.S.C. § 2255, F.R.C.P., Rule 60 (b) and/or Any Available Federal Remedy."

All claims asserted by the Petitioner were discovered by mere chance as the Petitioner fought to preserve his medical practice, and none of them were discovered or discoverable until within a few months of the date he filed his motion.

The District Court failed to consider whether the Petitioner's claims are cognizable under F.R.C.P., Rule 60 (b), 28 U.S.C. § 2254 or any available federal remedy, and that Court dismissed the motion as being untimely filed and further denied the Petitioner a COA. Appendix C.

On or about August 15, 2004, the Petitioner timely filed his notice of appeal and this unsuccessful appeal followed.

MAY IT PLEASE THE COURT:

ARGUMENTS IN SUPPORT OF GRANTING CERTIORARI

I

IN DENYING THE CERFIFICATE OF APPEAL-ABILITY (COA) WITHOUT CONDUCTING AN EVIDENTIARY HEARING AND/OR MAKING AN INDIVIDUALIZED DETERMINATION OF THE CONSTITUTIONAL MERITS OF EACH CLAIM PRESENTED, THE DISTRICT COURT BELOW AND THE SIXTH CIRCUIT COURT OF APPEALS ENTERED INTO CONFLICT WITH THE HOLDINGS OF THE U. S. SUPREME COURT, THE HOLDINGS OF OTHER CIRCUITS AND THE SIXTH CIRCUIT COURT'S OWN HOLDINGS.

It is clear upon the record that the District Court below made no individualized determination of the Constitutional merits of this case. Moreover, the District Court foreclosed all consideration of granting a COA before the Petitioner

had an opportunity to seek it. See Appendix E; Slack v. McDaniel, 529 U.S. 473, 120 S. Ct. 1595, 146 L.Ed.2d 542 (2000); Murphy v. Ohio, 269 F.3d 466 (6th Cir. 2001).

In Slack, the U.S. Supreme Court set forth the threshold requirements for granting or denying the COA. In order to make a showing sufficient for the granting of a COA, the Petitioner need only make a substantial showing of the denial of a federal right. Barefoot v. Estelle, 463 U.S. 880 (1983).

(a)

(Compulsion, Duress & Entrapment)

This Court need look no farther than the Government's own transcription of a secretly recorded conversation on March 26, 2001 wherein CI Heard threatened "we'll have to kill him" concerning Petitioner's business partner, Fred Bayne, if Bayne failed to turn over the insurance check. Appendix L, p. 3, at line 12.

Beyond the death-threat apparent in the Government's own records, there are, undoubtedly, dozens of persons who heard the graphic threats of violence and death made against the Petitioner and/or his family over the several months that CI Heard pressured the Petitioner to "give up the car." See the affidavits at Appendix F, G, H, I, J and K.

Under Tennessee law and U. S. Supreme Court controlling authorities, this is a case of "actual innocence" wherein the Government went to terroristic lengths to create a crime in order to prosecute it. Jacobson v. United States, 503 U.S. 540 (1992); Sherman v. United States, 356 U.S. 369 (1958) and Sorrells v. United States, 287 U.S. 435 (1992). Appendix M.

Neither in Jacobson, Sherman nor Sorrells was there any allegation of Government death threats, Mafia styled " hits" or midnight rides against defenseless women and children. The conduct underlying the instant entrapment is vastly more vicious and absurdly unconstitutional than that condemned in Jacobson, Sherman and Sorrells, combined.

The Petitioner contends that he was denied his Federal rights to due process when he, his family and his business

partner, Fred Bayne, were subjected to terroristic threats of physical violence and death by the Government and its agents, simply to create a pretext for bringing a criminal prosecution against the Petitioner. U.S. Const., Amend. 5.

(b)
(Ineffectiveness of Counsel)

Notwithstanding the holdings of Jacobson, Sherman and Sorrells, supra and Tennessee law at §§ 39-11-504(a) and 39-11-505, Trail Counsel did nothing to explore, assert and preserve the only viable defenses available to the Petitioner Telling the Petitioner that he was "guilty" of mail fraud, regardless to the illegal Government pressure, Counsel errantly advised the Petitioner to change his plea without bothering to secure a plea agreement with the Government. Appendix M.

In Beasley v. United States, 491 F. 2d 687, 696 (6th Cir. 1974), the Sixth Circuit held that it violates the standards of

legal competence for an attorney to deprive his client of "a substantial defense." In Strickland v. Washington, 104 S. Ct. 2052 (1984), the Supreme Court focused on whether the failures of counsel so undermined the adversarial process that the proceedings cannot be relied upon as having produced a just result. United States v. Cronic, 466 U.S. 648 (1984).

But for Counsel's errant advice, the Petitioner would have insisted on going to trial and the results would have been far different. See Petitioner's affidavit at numerical paragraph 18. See also Hill v. Lockhart, 477 U.S. 52, 59 (1985); Strickland, supra.

Through his total abandonment of the Petitioner to the prosecution interest, Counsel was ineffective. Strickland, supra; Arrendondo v. United States, 178 F. 3d 778 (6th Cir. 1999); Finch v. Vaughn, 67 F. 3d 909 (11th Cir. 1995).

(c)
(Conflict of Interest)

So bizarre and feckless is the conduct of Counsel, that it is wholly inconsistent with any posture remotely resembling effective representation. If Counsel's failure to assert and preserve the Petitioner's only valid course of defense (entrapment) arose from his failure to know the law, then Counsel was ineffective. Ultimately, a "lawyer must know what the law is.." Bounds v. Smith, 97, S.Ct. 1491, 1497 (1977). Beasley; Finch; Strickland, supra.

If, Counsel's failure to assert and preserve entrapment as

the only line of defense arose from conflicts of interests attending his long-standing relationship with and representation of the Government's agent, Counsel was again ineffective and "prejudice is presumed." See Affidavit of William Dilbeck, Jr., at par. 4; Cuyler v. Sullivan, 446 U.S. 335 (1980); Strickland, supra at 2067.

There could have been no strategic choice in Counsel's failure to assert any defense whatsoever. However, absent a conviction of this Petitioner, it is very likely that CI Heard could have expected no quid pro quo from the Government, and Counsel's errant advice that the Petitioner change his plea ultimately secured the very conviction that Heard needed. Conflicting interests, therefore, offer the only reasonable explanation for Counsel's glaring failures. Beasley and Strickland, supra.

It should be noted that Tennessee Court Rules (TCR), under which Attorney Summer routinely practices, deal both with conflicts of interest and attorney-client confidentiality. These rules impose on attorneys a duty of loyalty and confidentiality towards former clients. TCR, Rule 8, RPC 1.6. See also RPC 1.6 through 1.8.

However, the right to counsel guaranteed by the Fifth Amendment to the U.S. Co[illegible]itution "contemplates the services of an attorney devoted solely to the interests of his client" – i.e., "undivided allegiance and faithful, devoted service." Von Molthe v. Gilles, 68 S. Ct. 316 (1948).

The District Court below acknowledges this Petitioner's proofs that Counsel knew and represented Heard in 1994, 1995 and 2003 – before and after Counsel met and represented this Petitioner. However, venturing outside the

record to view the actions and/or inactions of Trail Counsel in the most benign light possible, the District Court chose to believe that there is no "continuing relationship." Appendix E. (Memorandum at Footnote[1]).

Heard's record hosts dozens of charges and/or convictions, some of which have been expunged. In the absence of an evidentiary hearing, there is nothing in the record below to indicate how many times he was represented by Mr. Summers or whether CI Heard and Attorney Summers are high-school classmates, old drinking buddies or blood relatives. Nor does the record refute the strong inference that a continuing relationship existed and influenced Counsel's dismal performance.

Counsel owed a duty of "undivided allegiance" to this Petitioner, as well as a duty to reveal any actual or potential conflict. Cuyler; Strickland, supra.

In United States v. Hall, 200 F. 3d 962 (6th Cir. 2000), the attorney had a long relationship with Rex Hall, a former Confidential Informant, but little or no relationship with his younger brother, Stanley. This conflict resulted in unequal and ineffective representation of the younger brother. See also Harris v. Carter, 337 F. 3d 758 (6th Cir. 2003); Banks v. Dretke, 124 S. Ct. 1256 (Certiorari granted to the 5th Cir. Decided 02/24/04).

(d)

(Plea Neither Knowingly nor Intelligently Entered)

The Petitioner, a physician, knew nothing of his rights under law and he didn't know the law as it related to the facts of his case. He didn't know that there were laws and

case laws on entrapment that provided him a strong defense; he didn't know that he could have appealed on the grounds of entrapment notwithstanding his plea. See McCarthy v. United States, 394 U.S. 459 (1969); Jacobson; Sherman; Sorrells; supra;

Most significantly, the Petitioner didn't know about the long and cozy relationship between his attorney and CI Heard, the very man who had bullied him into the conduct for which he was being prosecuted. McCarthy, supra.

Finally, neither Trail Court nor Petitioner's Attorney informed him that his guilty plea would expose him to State prosecution and loss of his medical license. Both the Court and Trail Counsel led the Petitioner to believe just the opposite – that he could return to his medical practice free

from all further sanctions. Fed. Rules.Crim.Proc., Rule 11 (c) and (f); Boykin v. Alabama, 395 U.S. 238 (1969); Finch, supra.

(e)

(Outrageous Governmental Conduct)

It is difficult to imagine Governmental conduct more outrageous than the terroristic threats to which the Petitioner, his wife, children and business partner were subjected, in the process of manufacturing a crime simply for the purpose of prosecution.

The case of Jacobson, supra, dealt with pornographic literature, while those of Sherman and Sorrells, respectively, dealt with liquor sales and narcotics

trafficking. In each of these three (3) cases there was some degree of prior conduct at least arguably indicating

predisposition on the parts of the accused. However, in the instant case there was none.

Moreover, here, the Petitioner steadfastly resisted the Government's inducements and murderous threats, until a late-night visit to his home, wife and children produced a terrified call that overcame all further resistance. Returning home the very next day, he agreed to surrender the vehicle to the Government agent. See Affidavits at Appendix F and G.

When the Government behaves in this manner against a citizen, dismissal is fully warranted. United States v. Valencia, 541 F. 2d 618 (1976); United States v. Bogart, 783 F. 2d 1428 (9th Cir. 1986).

In case of Miller-El v. Cockrell, 537 U. U. 322 (2003), this High Court reversed on the finding that the district court did not "give full consideration to the substantial evidence petitioner put fourth." In the instant case, the esteemed District Court made no effort at an individualized determination of the rich Constitutional merits of Petitioner's claims. Reasonable jurists might easily have concluded otherwise and invited the Petitioner to come forward. Murphy; Slack, supra.

II

INDENYING THE COA WITHOUT CONSIDERING THE VALID, STATUTORY EXCEPTION THAT THE EXISTENCE OF MERITORIOUS CONSTITUTIONAL

CLAIMS WERE ACTIVELY CONCEALED FROM THE PETITIONER BY HIS CONFLICTED ATTORNEY, THE DISTRICT COURT BELOW AND THE SIXTH CIRCUIT COURT OF APPEALS ARBITRARILY CREATED AN ABSOLUTE PROCEDURAL TIME-BAR TO SAID CLAIMS, CONTRARY TO THE EXPRESS WILL OF CONGRESS AND THE MANDATES OF THE U. S. SUPREME COURT.

Where, as here, Trial Counsel deliberately concealed from the Petitioner al' viable defenses and the conflicting relationship he shared with the Government's agent, no amount of due diligence could have cured the subterfuge.[3]

In Amadeo v. Zant, 486 U.S. 214 (1988), the Supreme Court addressed the question of a racial and gender disparity engineered by a memorandum from the District Attorney. As the memorandum was deliberately concealed, it was held that cause was established for the delay.

The Supreme Court further noted that the concealed memorandum was "discovered by mere fortuity," as there was no way that the Petitioner's lawyers could have otherwise learned of its existence in time to raise the jury challenge during trial. Amadeo, supra; Jamison v. Collins, 291 F. 3d 380 (6th Cir. 2002).

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[3] Congress, at 28 U. S. C. § 2255's provision that the 1-year statute of limitation shall run from the "latest of (4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence, " created an exception. See 28 U. S. C. § 2244 (b) (2) (B) (i) and (ii).

In the instant case, the factual and/or legal bases were not reasonably available to the Petitioner, as they were deliberately concealed from him by his Attorney. Absent the replacement of his Attorney in the Civil case and absent his having become actively involved in the fight to protect his medical license, the Petitioner might never have learned about his Attorney's errant advice nor the relationship between his Attorney and CI Heard. Concealment of the relevant facts and law is, therefore, the sine qua non to any delay. Murray v. Carrier, 477 U. S. 488 (1986).

Concealment of the relevant facts and law further acted to toll the time limitations, creating a valid cause and exception for the timely filing of Petitioner's Constitutional claims. The prejudice in the instant case is that an "actually stripped of his liberties and his sparkling, medical career. Amadeo; Cuyler; Strickland, supra; 28 U. S. C. § 2244 (b) (2) (B) (i) and (ii).

III

PREEJUDICIAL ERROR OBTAINED FROM THE FAILTURE OF THE DISTRICT COURT BELOW AND SIXTH CIRCUIT COURT OF APPEALS TO ENTERTAIN PETITIONER'S PLEA THAT HIS CONSTITUTIONAL CLAIMS BE COUNTENANCED UNDER F.R.C.P., RULE 60 (b), AND WRIT OF CORAM NOBIS.

It is clear upon the record that the Petitioner sought review of his claims "Pursuant to 28 U.S.C. § 2255, F.R.C.P., rule 60 (b) and/or Any Available Federal Remedy." At page 20 of the instant motion (at footnote [2]), the Petitioner further stated: "In seeking review of the instant claim under "any available Federal remedy," the Movant seeks review pursuant to 28 U.S.C. § 2254, IF APPLICABLE."

F.R.C.P., Rule 60 (b) and the Writ of Coram Nobis, although ignored, afforded an excellent opportunity for justice to be done and further injustice to be curtailed in this case. United States v. Morgan, 346 U.S. 502 (1954).

CONCLUSION

Wherefore, upon the forgoing proofs that a gross miscarriage of justice has resulted in the destruction of the life and medical practice of a valuable member of our society, the Petitioner prays that his cause shall find favor with the Court and that the Writ of Certiorari shall issue to review the decision of the U.S. Court of Appeals for the Sixth Circuit, entered November 23, 2004 (Reh. en banc denied 03/18/05).

Respectfully submitted,

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PETITIONER, pro se

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OCTOBER TERM, 2004

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Respondent	)

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FOR THE SIXTH CIRCUIT

PETITIONER'S APPENDIX

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INDEX TO APPENDIX

DOCUMENT DESCRIPTION	APPENDIX	PAGE NOS.
Sixth Circuit Ct. of Appeals Order Denying the COA.....	A	1-2
Sixth Circuit Ct. of Appeals Order Denying Rehearing en banc.....	B	3-4
U.S. Dist. Ct. Memorandum-Order Dismissing §2255, etc. Motion.....	C	5-10
U.S. Dist. Ct. Judgment.....	D	11-28
Affidavit of Caraline Robinson.....	E	29-30
Affidavit of Dr. Robert A. Burkich...	F	31-34
Affidavit of Catherine A. Burkich.....	G	35-40
Affidavit of Dr. David Z. Evdokimow.	H	41-42

INDEX TO APPENDIX (cont)...

DOCUMENT DESCRIPTION	APPENDIX	PAGE NOS.
Affidavit of William Dilbeck, Jr.....	I	43-44
Affidavit of Darren Webb.....	J	45-47
Affidavit of Woodrow Brank.....	K	48-50
Transcript of 03/26/01 Conversation Between CI Heard and Petitioner.....	L	51-56
Tennessee Law (Duress & Entrapment;) §§ 39-11-504; 39-11-505.....	M	57-58

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT A. BURKICH, Petitioner-Appellant,	)	
v.	)	ORDER
UNITED STATES OF AMERICA, Respondent-Appellee.	)	

Robert A. Burkich appeals a district court judgment denying his motion to vacate his sentence construed to be filed under 28 U.S.C. § 2255. Burkich has filed an application for a certificate of appealability (COA) pursuant to Fed. R. App. P. 22(b)(1).

In 2002, Burkich pleaded guilty to mail fraud in violation of 18 U.S.C. § 1341. The district court sentenced him to one year of probation. Burkich did not pursue an appeal.

Thereafter, Burkich filed his § 2255 motion. It appears that Burkich mailed the motion on July 10, 2004, and it was file-stamped on July 12, 2004. In support of the § 2255 motion, Burkich essentially argued that: 1) his involvement in the offense was obtained through compulsion, duress, and entrapment by the government; 2) counsel rendered ineffective assistance; 3) his plea was not knowing and voluntary; and 4) the government's outrageous and unconstitutional conduct rendered his conviction void.

Upon review, the district court denied Burkich's § 2255 motion as untimely.

The record clearly reflects the Burkich did not file his § 2255 motion within the applicable one-year statute of limitations period provided under the Anti-Terrorism and Effective Death Penalty Act. *See 28* U.S.C. § 2244 (d)(1); see also Dunlap v. United States, 250 F. 3d 1001, 1004-05 (6th Cir. 2001). Burkich's appeal became final on April 12, 2002, ten days after the entry of his judgment of conviction and sentence, because he did not pursue a direct appeal. *See Sanchez-Castellano v. United States*, 358 F. 3d 424, 426-27 (6th Cir. 2004). Hence, Burkich had until April 14, 2003, to file his § 2255 motion, it is noted that April 12, 2003, fell on a Saturday. Burkich did not file his motion until July 10, 2004, *see Houston v. Lack*, 487 U.S. 266,276 (1998), well beyond the one-year statute of limitations.

Upon review, we conclude that Burkich is not entitled to a COA because the district court's decision is not debatable among jurists of reason. *See Miller-El v. Cockrell*, 537 U.S. 322, 336 (2003).

Accordingly, Burkich's application for a certificate of appealability is denied.

SO ORDERED
ENTER this 23rd day of November, 2004

ENTERED BY ORDER OF THE COURT
/s/ Leonard Green
Clerk

APPENDIX A
(PAGE 2)

NO. 04-6027

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT A. BURKICH,)
Petitioner-Appellant,)
)
VS.)
)
UNITED STATES OF AMERICA,)
Respondent-Appellee,)

Before: MERRITT, NELSON AND ROGERS,
CIRCUIT JUDGES

Robert A. Burkich petitions the court to rehear en banc its order denying him a certificate of appealability. The petition has been referred to a panel of three judges on which the original deciding judge does not sit, as well as to all active judges of the court. No judge having requested a vote on the suggestion for en banc rehearing, the petition was referred to the panel of three judges for determination on merits of the petition for rehearing.

The panel has further reviewed the petition for rehearing and concludes the application for a certificate of appealability was properly denied.

Accordingly, the petition for rehearing en banc is denied. See Fed.R. App. P 40(a).

SO ORDERED.
ENTER this 18th day of March, 2005

ENTERED BY ORDER OF THE COURT

/s/ Leonard Green,
Clerk

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)	
	)	1:04-cv-213/
v.	)	1:01-cr-144
	)	Edgar
ROBERT A. BURKICH	)	

MEMORANDUM

Defendant Robert A. Burkich ("Burkich") has filed a *pro se* motion for post-conviction relief pursuant to 28 U.S.C. § 2255. Burkich pleaded guilty to one count of mail fraud in violation of 18 U.S.C. § 1341. Burkich contends his involvement in the car-theft scheme was due to the government's use of entrapment, coercion, and duress. Burkich also claims his plea was involuntary and counsel was ineffective due to counsel's conflict[1] and failure to assert the entrapment defense on Burkich's behalf.

---

[1] Burkich claims it has recently come to his attention that his defense attorney represented the government informant involved in Burkich's criminal case during 1994, 1995, and 2003. Presumably, Burkich is asserting that his § 2255 motion is filed within one year from the date on which the facts supporting the claim of conflict to interest could have been discovered through the exercise of due diligence, thus, rendering his § 2255 motion timely.

Pursuant to 28 U.S.C. § 2255 there is one year statute of limitations for filing a § 2255 motion. The statute provides in pertinent part that:

A 1-period limitation shall apply to a motion under this section. The limitation period shall run from the year The limitation period shall run from the provides in pertinent part that: latest of-...(4) the date on which the facts supporting the claim or claims presented could have been discovered through the exercise of due diligence.

However, any claim that the statute of limitations did not begin to run until Burkich became aware of his defense attorney's representation of the government witness involved in his criminal case must fail because Burkich has made no showing of his defense counsel having competing interests or actual conflict. The attorney's relationship with the government informant was apparently terminated and unrelated to Burkich's case. It appears that Burkich hired his attorney in 2001. The record indicates that his attorney represented the government informant in 1994 and 1995, and then again in 2003 [Court File No. 1]. There is nothing in the record to indicate the alleged conflict affected the adequacy in counsel's representation or affected Burkich's plea. *See Cuyler v. Sullivan*, 446 U.S. 335, 349-350 (1980); *Dukes v. Warden, Conn. State Prison*, 4069 U.S. 250 (1972). Consequently, the one year statute of limitations in this case began to run on the date on which the judgment of conviction became final.

Pursuant to the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA"), there is a one-year statute of limitation for filing a § 2255 motion. *See* 28 U.S.C. § 2255. Burkich was sentenced to a term of probation for one (1) year on March 25, 2002, upon a plea of guilty to one court of mail fraud. Burkich's judgment was entered on April 2, 2002.[2] Burkich did not pursue a direct appeal. Burkich's judment was entered on April 2,2002, and he had ten (10) days (until April 12, 2002) to file a notice of appeal. When a § 2255 motion does not pursue a direct appeal to the court of appeals, his conviction becomes final on the date on which the time for filing such appeal expired. *Sanchez-Castellano v. United States*, 358 F. 3d 424, 425 (6th Cir. 2004). Therefore, the one-year statute of limitations began to run on April 12, 2002. Consequently, Burkich's motion is untimely.

---

[2] An amended judgment was entered on April 11, 2002, to change the probation range of 1 to 5 years to 1 to 1 years. The amended judgment has no effect when calculating the statute of limitations. However, the Court observes that even if it uses the date the amended judgment was entered *i.e.*, April 11, 2002, the § 2255 motion no later than Monday, April 14, 2003.

Burkich had one year from the time his judgment of conviction became final to file his § 2255 motion. April 12, 2002, was the date Burkich's right to file an appeal expired. Thus, Burkich was required to file his § 2255 motion by April 14, 2003.[3] Burkich's § 2255 motion was stamped filed by the District Court Clerk on July 12, 2004, well after expiration of the one-year statute of limitation for filing his § 2255 motion. Consequently, Burkich's § 2255 motion is time- barred by the statue of limitations and will be **DISMISSED** [Court File No. 1].

An appropriate order will enter.

/s/ R. Allen Edgar
R. ALLEN EDGAR
CHIEF UNITED STATES DISTICT JUDGE

---

[3] The one-year statute of limitations expired on April 12, 2003. However, since it fell on Saturday, Burkich was required to file his §2255 motion no later than Monday, April 14, 2003.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TENNESSEE
at CHATTANOOGA

UNITED STATES OF AMERICA	)
	)
VS.	)
	)
ROBERT A. BURKICH	)

ORDER

In accordance with the accompanying memorandum, the motion filed by Robert A. Burkich ('Burkich") for relief under 28 U.S.C. § 2255 is **DENIED** as time-barred by the statute of limitations [Court File No. 1].

The court has assessed its determination that Burkich's § 2255 motion is timed-barred based on the analysis required by Slack v. McDaniel, 529 U.S. 473 (200). See Porterfield v. Bell, 258 F. 3d 484, 487 (6th cir. 2001); see also Murphy v. Ohio, 263 F.3d 466,467 (6th cir. 2001))remanding death-row inmate's § 2254 case for reconsideration of each claim in light of Slack). This Court finds that reasonable jurists could not find this Court's assessment that Burkich's § 2255 motion is time-barred debatable or wrong. Accordingly, should Burkich give timely notice of an appeal from this order, such notice will

be treated as an application for a certificate of appealability, which is hereby **DENIED** for the above stated reasons and since he has failed to make a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253(c)(2); Rule 22(b) of the FEDERAL RULES OF APPELLATE PROCEDURE.

In addition, the Court has reviewed this case pursuant to 28 U.S.C. § 1915(a)(3) and Rule 24 of the FEDERAL RULES OF APPELLATE PROCEDURE and hereby **CERTIFIES** that any appeal from this action would not be taken in good faith and would be totally frivolous. Therefore any application by Burkich for leave to proceed in forma paupperis on appeal is **DENIED.** 28 U.S.C. § 1915(a)(3), FED. R. App. P. 24.

SO ORDERED.

ENTER this 6th day of August, 2004.

/s/ R. Alan Edgar
R. ALLAN EDGAR
CHIEF UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
Eastern District of Tennessee

UNITED STATES OF AMERICA

v.

ROBERT A. BURKICH

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)
Case Number: 1:01-CR-144-01
Jerry Summers
Defendant's Attorney

THE DEFENDANT:

[√] pleaded guilty to count(s): One of the Indictment

[ ] pleaded nolo contender to count(s)_which was accepted by the court.

[ ] was found guilty on count(s)_after a plea of not guilty

ACCORDINGLY, the court has adjudicated that the defendant is guilty of the following offense(s):

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18 U.S.C. § 1341	Mail Fraud	3/21/2001	One

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

The defendant is sentenced as provided in pages 2 through 5 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

[ ] The defendant has been found not guilty on count(s)_.

[√] Count(s) two of the Indictment [√] is [ ] are dismissed on the motion of the United States.

IT IS ORDERED that the defendant shall notify the United States Attorney for the district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid. If ordered to pay restitution, the defendant shall notify the court and the United States attorney of any material change in the defendant's economic circumstances.

Defendant's Soc. Sec. No.: 134-40-9362

Defendant's Date of Birth: 05/27/1960

Defendant's USM No.: 18220-074

Defendant's Residence Address:
5812 Lake Resort Dr.
Chattanooga, TN 37343

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-14401

Defendant's Mailing Address
5812 Lake Resort Dr.
Chattanooga, TN 37343

3/25/02
Date of Imposition of Judgment

/s/ R. Allen Edgar
Signature of Judicial officer

R ALLEN EDGAR, Chief United States District Judge
Name &Title of Judicial Officer

April 2, 2002
Date

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

PROBATION

The defendant is herby placed on probation for a term of 1 year.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally posses a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of placement on probation and at least two periodic drug test thereafter.

[√] The above drug testing condition is suspended, based on the court's determination that the defendant poses a low risk of future substance abuse.

APPENDIX D
(PAGE 14)

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

[√] The defendant shall not possess a firearm, destructive device, or any other dangerous weapons.

If this judgment imposes a fine or a restitution obligation, it shall be condition of probation that the defendant pay any such fine or restitution in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) the defendant shall not leave the judicial district without permission of the court or probation officer;
2) the defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) the defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

4) the defendant shall support his or her dependants and meet other family responsibilities;
5) the defendant shall work regularly at a lawful occupation, unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) the defendant shall notify the probation officer at least ten days prior to any change in residence or employment;
7) the defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute, or administer any controlled substance or any paraphernalia related to any controlled substances, except as prescribed by a physician;
8) the defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;
9) the defendant shall not associate with any persons engaged in criminal activity and shall not associate with any person convicted of a felony, unless granted permission to do so by the probation officer;

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

10) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) the defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
12) the defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court;
13) as directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

SPECIAL CONDTIONS OF SUPERVISION

The defendant shall pay any financial penalty that is imposed by this judgment.

The defendant shall provide the probation officer with access to any requested financial information.

The defendant shall not incur new credit charges or open additional lines of credit without permission of the probation officer until the fine has been paid in full.

The defendant shall perform 150 hours of community service as directed by the probation officer.

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part b. The assessment is ordered in accordance with 18 U.S.C. § 3013.

	Assessment	Fine	Restitution
Totals:	$100.00	$4,000.00	$

The defendant will notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay the fine or special assessment.

[ ] The determination of restitution is deferred until__. An *Amended Judgment* in a Criminal Case (AO 245C) will be entered after such determination.

[ ] The defendant shall make restitution (including community restitution) to the following payees in the amounts listed below.

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

If the defendant makes a partial payment, each shall receive an approximately proportioned payment, unless specified otherwise in the priority order or percentage payment column below. However, if the United States is a victim, all other victims, if any, shall receive full restitution before the United States receives any restitution, and all restitution shall be paid to the victims before any restitution is paid to a provider of compensation, pursuant to 18 U.S.C. § 3664.

Name of Payee	*Total Amount of Loss	Amount of Restitution Ordered	Priority Order or Percentage of Payment
TOTALS:	$_	$_	$_

[ ] If applicable, restitution amount ordered pursuant to plea agreement $__

The defendant shall pay interest on any fine or restitution of more than $2500, unless the fine or restitution is paid in full

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

before the fifteenth day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for delinquency and default, pursuant to 18 U.S.C. § 3612(g).

[ ] The court determined that the defendant does not have the ability to pay interest, and it is ordered that:

[ ] The interest requirement is waived for the
[ ] fine and/or [ ] restitution.
[ ] The interest requirement of the [ ] fine and/or
[ ] restitution is modified as follow:

APPENDIX D
(PAGE 21)

* Findings for the total amount of loses are required under Chapters 109A, 110, 110A, and 113A of Title 18, United States Code, for offenses committed on or after September 13, 1994 but before April 23, 1996.

DEFENDANT: Robert A. BURKICH
CASE NUMBER: 1:01 – CR – 144 - 01

SCHEDULE OF PAYMENTS

Having assessed the defendant's ability to pay, payment of the total criminal penalties shall be due as follows:

A [√] Lump sum payment of $ 4,100.00 due immediately, balance due
[ ] not later than _, or
[√] in accordance with [ ]C, [ ]D, or [√]E below); or

B [ ] Payment to begin immediately (may be combined with
[ ] C, [ ]D, or [ ]E below); or

C [ ] Payment in __ (e.g., equal, weekly, monthly, quarterly) Installments of $__ over a period of __ (e.g., months or years), to commence__ (e.g., 30 or 60 days) after the date of this judgment; or

D [ ] Payment in __ (e.g., equal, weekly, monthly, quarterly) installments of $__ over a period of __ (e.g., months or years), to commence__ (e.g., 30 or 60 days) after the release from imprisonment to a term of supervision; or

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

E [√] Special instructions regarding the payment of criminal Monetary penalties:

Unless the court has expressly ordered otherwise in the special instruction above, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment. Unless otherwise directed by the court, the probation officer, or the United States attorney, all criminal monetary penalties, except those payments made through the Federal Bureau of prison's Inmate Financial Responsibility Program, shall be made to U.S. District Court, 800 Market St., Suite 130, Knoxville, TN. 37902. Payments shall be in the form of a check or a money order, made payable to U.S. District Court, with a notation of the case number.

The defendant shall receive credit for all payments previously made toward any criminal monetary penalties imposed.

Judgment-Page 5 of 5

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

[ ] Joint and Several
Defendant Name, Case Number, and Joint and Several Amount:

[ ] The defendant shall pay the cost of prosecution.

[ ] The defendant shall pay the following court cost(s):

[ ] The defendant shall forfeit the defendant's interest in the following property to the United States:

APPENDIX D
(PAGE 24)

Payments shall be applied in the following order: (1) assessment, (2) restitution principal, (3) restitution interest, (4) fine principal, (5) community restitution, (6) fine interest (7) penalties, and (8) costs, including cost of prosecution and court costs.

ATTACHMENT

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

STATEMENT OF REASONS
(Not for Public Disclosure)

[√] The court adopts the factual findings and guideline application in the presentence report.

OR

[ ] The court adopts the factual findings and guideline application in the presentence report, except (see attachment, if necessary):

Guideline Range Determined by the Court:

Total Offense Level: 8
Criminal History Category: I
Imprisonment Range 0 to 6 months
Probation Range: 1 to 5 years
Supervised Release Range: 2 to 3 years
Fine Range: $1,000 to $10,000

[ ] Fine waived or below the guideline range because of inability to pay.

ATTACHMENT

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

Total Amount of Restitution: $N/A

[√] Discretionary restitution is not ordered because the complication and prolongation of the sentencing process resulting from the fashioning of a restitution order outweighs the need to provide restitution to any victims, pursuant to 18 U.S.C. § 3663 (a) (B) (ii) (or in offenses committed before April 23, 1996, pursuant to 18 U.S.C. § 3663(d)).

[ ] Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because the number of identifiable victims is so large as to make restitution impracticable, pursuant to 18 U.S.C. 3663A(c)(3)(A).

[ ] Restitution pursuant to the mandatory victim restitution provisions is not ordered in this title 18 property offense because determining complex issues of fact related to the cause of amount of the victim's losses would complicate or prolong the sentencing process, pursuant to 18 U.S.C. 3663A(c)(3)(B).

ATTACHMENT

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

[ ] For offenses committed on or after September 13, 1994 but before April 23, 1996 that require the total amount of loss to be stated, pursuant to Chapters 109A, 110, 110A, and 113A of Title 18, restitution is not ordered because the economic circumstances of the defendant do not allow for the payment of any amount of a restitution order, and do not allow for the payment of any or some portion of a restitution order in the foreseeable future under any reasonable schedule or payments.

[ ] Partial restitution is ordered, pursuant to 18 U.S.C. § 3553(c), for the following reason(s):

ATTACHMENT

DEFENDANT: ROBERT A. BURKICH
CASE NUMBER: 1:01-CR-144-01

STATEMENT OF REASONS
(Not for Public Disclosure)

[√] The sentence is within the guideline range, that does not exceed 24months, and the court finds no reason to depart from the sentence called for by application of the guidelines.

OR

[ ] The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reasons:

OR

[ ] The sentence departs from the guideline range:

[ ] upon motion of the government, as a result of defendant's substantial assistance, or

[ ] for the following specific reason(s):

AFFIDAVIT OF CARALINE ROBINSON

I, Caraline Robinson, Affiant, after first being duly sworn, do hereby state as follows:

1. That I lived with Mac Heard for eight (8) years, and I was married to him for four of those years.
2. That throughout the time I knew him, Mac Heard was filled with jealous rage and wanted to kill anyone who looked at me
3. That Mac had a violent past, often threatening to kill me and to kill my father, and I once reported him to Federal authorities, but nothing ever came of it.
4. That Mac tied up my dog and cut his head off with an axe, and threatened to cut my head off if I ever left him.
5. That Mac often boasted of Mafia connections and would do anything to scare or intimidate people.
6. That I only met Dr. Burkich one time in four years, and that was when I went to his office with Mac.
7. That shortly after our visit to Dr. Burkich's office, I separated from Mac and was living in Georgia.
8. That I was therefore unaware of his angry campaign against Dr. Burkich.

Further Affiant sayeth naught.

STATE OF TENNESSEE }
}SS:
COUNTY OF HAMILTON }

/s/ Caraline Robinson
CARALINE ROBINSON-AFFIANT
P. O. Box 505
Moody, AL. 35004

Subscribed and sworn to before me by Caraline Robinson, Affiant, as his "Affidavit," this the 9 day of May, 2004.

/s/ Wanda W Thompson
NOTARY PUBLIC-STATE-AT-LARGE

My commission expires: 12/31/05

APPENDIX E
(PAGE 30)

AFFIDAVIT OF DR. ROBERT A. BURKICH IN SUPPORT OF MOTION TO VACATE, SET ASIDE OR CORRECT SENTENCE, PURSUANT TO 28 U.S.C. § 2255, F.R.C.P., RULE 60 (b) AND/OR ANY AVAILABLE FEDERAL REMEDY

I, Robert A. Burkich, Affiant, after first being duly sworn, do hereby state as follows:

1. That I am the named Robert A. Burkich in CR 1-01-144, and at all times during the formative history of this action, I was duly licensed and practicing physician.

2. That I met Mr. Mac Heard around October of 2000 when he was referred to my clinic and became one of my patients.

3. That Mr. Heard expressed an interest in the 1997 Corvette I drove and suggested a scheme by which I could turn the Corvette over to him and get a new one.

4. That I told Mr. Heard in no uncertain terms that I was not interested in letting the car go.

5. That on one or two occasions, Mr. Heard's wife came by the clinic, reiterated Heard's scheme for getting rid of the Corvette, and again I expressed my total lack of interest.

6. That I never had any personal relationship of any kind with Mrs. Heard, nor any interest in any relationship with the woman.

7. That not infrequently, however, I did see her husband at my clinic, at the Web Site and elsewhere, and whenever opportunity permitted, he continued to press me to turn over the Corvette.

8. That, presenting a rough, swaggering appearance and manner, Mr. Heard, became increasingly aggressive and threatening.

9. That, saying that he and an unkown friend were contract killers -- hit men, Mr. Heard frequently boasted of his criminal background and repeatedly threatened my life and the life of Fred Bayne.

10. That over time he began accusing me of having an affair with his wife -- an utter fabrication that he began spreading among my family and our acquaintances.

11. That by the time of Mr. Heard's late-night visit to my home, my wife's frantic telephone call forced me to realize that I had to do something about the man.

12. That, however, I grappled with the very real fear that, if I did anything to upset Heard, he or his unknown associate would likely strike out against me or my family.

13. That in frustration I asked Darren Webb "What am I going to do with this guy?" Webb responded, "Go ahead and give him the car."

14. That it was some five months after Heard first approached me about the Corvette, I agreed to give him the car on the day following his late-night visit to my home.

15. That again I told Heard that I didn't own the Corvette and didn't stand to lose or gain from letting the vehicle go, but he insisted that I would receive $1,000.00 from the scheme.

16. That as daily use of the vehicle was much more valuable to me than $1,000.00, I had nothing to gain from this scheme, and but for the extraordinary pressure brought to bear on me and my family, I would never have become a part of it.

17. That I steadfastly rejected Mr. Heard's attempts to lure me into drug trafficking and yet another auto-theft operation.

18. That had my attorney or anyone explained to me that, under the facts and the law of my case, coercion and intimidation by Federal agents nullified any criminal liability on my part, I would have rejected his urgings that I change my plea.

19. That no one ever explained to me that my guilty plea would subject me to State prosecution, the forfeiture of my medical license and the loss of my life's work.

20. That I was given to understand that I could not be subjected to any further penalty beyond the criminal and civil sanctions explained by the Court, and had I known that a change of plea would jeopardize my medical license and my ability to care for my patients, I would not have changed my plea.

21. That although I've completed the probationary period of my sentence, I remain under the custody of my conviction, and it continues to adversely affect my life in many ways.

Further Affiant Sayeth Naught.

STATE OF TENNESSE)
) SS:
COUNTY OF HAMILTON)

/s/ Robert A. Burkich
Dr. Robert A. Burkich-AFFIANT
5812 Lake Resort Drive
Hixson, KY 37343

Subscribed and sworn to before me by Dr. Robert A. Burkich, Affiant, and his "Affidavit," this the ___ day of May, 2004.

/s/ Thomas C. Quillen
Notary Public-State at Large

My Commission expires: Oct. 12, 2004

AFFIDAVIT OF CATHERINE A. BURKICH

I, Catherine A. Burkich, Affiant, after first being duly sworn, do herby declare as follows:

1. I met Robert A. Burkich in June of 1989, and our resulting marriage lasted from 1989 until 2003.
2. In or around March of 2001, Dr. David Evdokimow, a colleague of my husband's called me to confirm the arrival time of his flight to Nashville, and I arranged for my husband to pick him up at the Nashville airport.
3. At around 11:00 p.m., on the night my husband left to pick up Dr. Evdokimow, I was in the driveway waving good-bye to my friends, Bruce and Angie, when two strange men in a truck approached the driveway.
4. As the truck backed up to let my friends out, I unsuccessfully tried to stop my friends, as I did not want to be left alone with two strange men.
5. As my friends drove away, the truck pulled into our driveway, and the man on the passenger side introduced himself as Mac Heard, said that he was looking for Dr. Robert Burkich and said that he was one of Dr. Burkich's patients.
6. Relaxing, I walked over to the truck and told Mr. Heard that my husband was out of town.
7. Mr. Heard then said something to the effect: " No he isn't. Your husband has been sleeping with my wife since early January, and I know for a fact that they are in a motel right now."

8. I told Mr. Heard that his accusations were impossible; that my husband was in Nashville, and that he would never have sexual relations with a patient.
9. Mr. Heard told me that he would take me to the motel where my husband and his wife were lodged, if I would get in the truck with them.
10. Realizing that Mr. Heard had been drinking and frightened by his accusations and tone of voice, I told him that I had four sleeping children in the house and that I wasn't going anywhere with them.
11. Mr. Heard told me to call my husband, and , deeply disturbed by his accusations, I called my husband on his cell phone.
12. After talking with my husband and Dr. Evdokimow, I obtained the telephone number of the motel, so that I could call them via the motel switchboard operator and confirm that they were both in Nashville.
13. I took the phone to Mr. Heard to let him talk with my husband and satisfy him that they were in Nashville and that there was no such relationship as he had indicated going on between my husband and his wife.
14. Even after talking with my husband, Mr. Heard seemed unconvinced, and saying "This one time doesn't matter," he related to me that he had been following my husband and his wife for months.
15. Mr. Heard asked me if my husband owned a pickup truck and when I assured him that he did not, he appeared perplexed but went on to inform me that he

had spoken to our realtor, after obtaining her number from the "for sale" sign posted outside our home.

16. Throughout, Mr. Heard's tone and remarks were angry and threatening, and when, while talking on the telephone, he began to act as if he were totally incoherent, it occurred to me that he was not only drunk but mentally unbalanced.
17. Although I never knew the name or identity of the man who was driving, he sat there saying nothing at all, and his silence frightened me even more.
18. I told the two men to leave at once or I would call the police, and when I went inside my house as if to call the police, the men backed out of our driveway and left.
19. Later, I talked to our realtor and was deeply embarrassed to learn that Mr. Heard, after initially feigning an interest in purchasing our home, had related to her that Dr. Burkich was having an affair with his wife.
20. I subsequently encountered Mr. Heard on perhaps three or four occasions, but as was and am truly afraid of him and was told by a friend or my husband that he is "crazy," I made every effort to avoid him.
21. My husband called one day, putting Mr. Heard on the phone, and Mr. Heard apologized for his earlier conduct, saying that he had been drunk and that he was wrong.

22. Mr. Heard's apology didn't change my opinion of him, and just a day or two later, I learned that my husband's Corvette was missing.
23. The moment I learned of Mac Heard's involvement in the Corvette scheme, I knew that Robert had been pressured into it by a combination of trickery and threats.
24. Notwithstanding Robert's shortcomings as a husband and a father – shortcomings that ultimately led to the dissolution of our marriage – I know him to be a dedicated doctor and an honest, decent, law-abiding human being who neither drank, smoked nor used drugs.
25. Having been insulated from many of the harsh realities that shape the everyday lives of most people, Robert has always been naïve and wholly unsuspecting of the darker motives of some individuals.
26. After resisting repeated attempts by Mr. Heard to entangle him in drug deals and other criminal activity, my husband finally gave in to his demands for the Corvette in order to get him out of our lives.
27. Robert is too trusting, and when charges were brought against him, be placed all his trust in his attorney, wanting only to put everything behind him and to give himself to the treatment of his patients.
28. Right up to the day before his plea-change hearing, Robert didn't know what his lawyer was doing until a letter arrived from his attorney.

29. Even then, he believed that he was going for a continuance hearing, and I had to explain to him that his attorney was apparently going to have him change his plea from "not guilty."

30. Although the change of plea was the product of poor legal advice and equally poor judgment, Robert' entanglement in this scheme reflects a predictable surrender to the threats and manipulation of a very dangerous individual, rather than a lack of moral character.

Further Affiant Sayeth Naught

STATE OF TENNESSEE)
) SS:
COUNTY OF HAMILTON)

/s/ Catherine A. Burkich
CATHERINE A. BURKICH-AFFIANT
5600 Lake Resort Terrace, Apt. N458
Chattanooga, TN 37415

Subscribed and sworn to before me be Catherine A. Burkich, Affiant, This 14th day of January, 2004.

/s/ Janet S. Kovaceich
NOTARY PUBLIC-STATE AT LARGE

My Commission Expires:
My Commission Expires June 10, 2006

AFFIDAVIT OF DR. DAVID Z. EVDOKIMOW, MD.

I, Dr. David Z. Evdokimow, MD, after first being duly sworn, do hereby declare as follows:

1. That on or about March 22, 2001, while in Nashville, Tennessee to interview for a medical position, I shared a room at the University Holiday Inn with a friend and colleague, Dr. Robert A. Burkich, MD.
2. That Dr. Burkich and I were alone in the room when he received a frantic call from his wife, relating that two men were at their home, making graphic threats against Dr. Burkich, with one of the men insisting that Dr. Burkich was having an affair with the man's wife.
3. That too, this man was apparently alleging that Dr. Burkich and his wife were somewhere in congress even as Mrs. Burkich was making her call.
4. That to assure his wife that there was not a shred of truth to the allegations, Dr. Burkich passed the phone to me.
5. That Mrs. Burkich, clearly alarmed, reiterated to me the accusations being made against her husband, and I assured her that the Doctor Burkich and I had been together; that we were alone in the motel room, totally exhausted, and that nothing in the nature of those allegations could be true.
6. That afterwards, Dr. Burkich, visibly shaken by the incident, expressed perplexity and grave concerns about this matter.

STATE OF NEW JERSEY }
}SS:
COUNTY OF UNION }

/s/ Dr. David Z. Evdokimow, MD.
DR. DAVID Z. EVDOKIMOW, MD
No. 9 DeForest Avenue
Summit, New Jersey 07901

Subscribed and sworn to before me by Dr. David Z. Evdokimow, MD, as his Affidavit, this 17th day of December, 2003.

/s/ Mary F. Higgins
NOTARY PUBLIC-STATE AT LARGE

My commission expires: my commission expires on August 10, 2005

AFFIDAVIT OF WILLIAM DILLBECK, JR.

I, William Dilbeck, Jr., Affiant, after duly sworn, do hereby states as follows:

1. I am a former police officer and I served from 1983 to 1987 with the Cleveland, Tennessee Police Department and the Bradley County Juvenile Division.
2. I've know Mr. Mac Heard for several years, and I had known him for some time before I came to know Dr. Robert A. Burkich a few years later.
3. Mac Heard held a bitter hatred for Dr. Burkich and told everyone that he came in contact with that Dr. Burkich was screwing his wife.
4. Heard often made angry threats against Dr. Burkich, openly threatening to kill him, and he was once put out of the Website club for his drunken rage against Dr. Burkich.
5. Heard called himself "Renegade," frequently bragged of his ties to "The Boys" in organized crime and claimed that he had five or six storage buildings with deep freezers that contained dead bodies.
6. Mac Heard claimed he couldn't remember how many men he had killed, and when he told it he could make you believe it.
7. Mac had a shrine made to himself at his car lot and had it plastered with newspaper clippings about his exploits.

8. I was with Mac Heard on the night that he insisted on going to Dr. Burkich's house and angrily confronted Mrs. Burkich, making accusations and threats against her husband.
9. I am also familiar with the Honorable Jerry Summers, the attorney who represented Dr. Burkich, and I have personal knowledge that Mr. Summers had represented Mac Heard for years before he represented Dr. Burkich, and that he has represented Mr. Heard subsequent to his representing Dr. Burkich.

Further Affiant sayeth naught.

STATE OF TENNESSE }
}SS:
COUNTY OF HAMILTON }

/s/ William Dilbeck, Jr.
WILLIAM DILBECK, JR.-AFFIANT
8570 Moody Parkway
Odenville, AL. 35120

Subscribed and sworn to before me by Mr. William Dilbeck, Jr., Affiant as his "Affidavit," this the 9th day of May, 2004.

/s/ Wanda W. Thompson
NOTARY PUBLIC-STATE-AT-LARGE
My commission expires: 12/31/05

AFFIDAVIT OF DARREN WEBB

I, Darren Webb, Affiant, after first being duly sworn, do hereby declare as follows:

1. That I have known Dr. Robert A. Burkich and his wife for quite some time; that I also know Mr. Mac Heard and I have personal knowledge of certain terroristic threats made against Dr. Burkich by a Mr. Mac Heard.
2. That in pr about the third week of March, 2001, I was with Dr. Burkich at a Wal-Mart store when he shared with me a cell-phone message that he had received from Mr. Heard, threatening his life.
3. That a few minutes later, Mr. Heard apparently called again, and after talking briefly with Mr. Heard, Dr. Burkich handed me the phone so that I could hear the things that Heard was saying.
4. That via the cell phone, I heard Mr. Heard angrily threatening Dr. Burkich, and knowing Dr. Burkich to be a quiet, decent man and a man who is unaccustomed to dealing with people like Heard, I told Heard to get off the phone and leave the man alone.
5. That shortly thereafter, Mac Heard began calling Dr. Burkich. Initially, he would say nothing into the phone, but once he began to speak he began to threaten Dr. Burkich.
6. That a few days later, I received a terrified call from his wife's cell phone. Mrs. Burkich stated that she and the children were home alone, that Dr. Burkich was out of town with another physician and that Mac Heard and an unidentified man had pulled up outside her residence and was parked in her driveway.

7. That Mrs. Burkich related that Mac Heard was making threats against Dr. Burkich to Mrs. Burkich, insisting that he (Heard) had photographic proof that Dr. Burkich was having an affair with his (Heard's) wife.
8. That it was not until she put Heard on the phone with me and I warned him that I was coming over with a security team from the club that he left the Burkich driveway.
9. that while I didn't see and hear all that Heard did and said, the appearance of Mr. Heard and the second, unidentified man at the Burkich home and the ensuring threats and accusations made before Mrs. Burkich were confirmed to me by Mrs. Burkich.
10. That based on my conversations with Mr. Heard and insight gained from conversations with both Dr. Burkich and his wife, it was clear to me that Mr. Heard was deliberately attempting to intimidate Dr. Burkich and his wife and that they were genuinely terrified by Mr. Heard and the very real threat he posed to them and their family.

Further Affiant Sayeth Naught.

STATF OF TENNESSEE)
) SS:
COUNTY OF HAMILTON)

/s/ Darren Webb
DARREN WEBB – AFFIANT
1401 McBrine Road
East Ridge, TN. 37412

Subcribed and sworen to before me by Darren Webb, Affiant, this 14th day of January, 2004

/s/ Carolyn McElhaney
NOTARY PUBLIC – STATE AT LARGE

My Commission expires: 9-7-06

AFFIDAVIT OF WOODROW F. BRANK

I, Woodrow F. Brank, Affiant, after first being duly sworn, do hereby state as follows:

1. I first met Mac Heard some years ago through my son who bought some cars from the man.
2. After meeting Heard, I also bought some cars from him and got to know him pretty well over time.
3. A big man, Heard projected the image of being a tough guy and regularly bragged of his connections with organized crime.
4. Heard regularly talked about killing people, and everyone who knew him considered him to be a very dangerous man.
5. It was about a year after meeting Mac Heard that I came to know Dr. Burkich.
6. Mac Heard often complained that Dr. Burkich was having an affair with his wife. He would describe the couch in Dr. Burkich's office, insisting that the doctor and his wife had sexual relationships on that couch .
7. Repeatedly Heard threatened to kick open the door to Dr. Burkich's office and give him the beating of his life.
8. On one occasion Heard bragged to me that he was going to send the doctor to the penitentiary. He said that he had set him up because Burkich had his wife.
9. WhenI told him that he was wrong about Dr. Burkich, he insisted that he wasn't wrong and bragged that he had confronted Dr. Burkich's wife.

10. I spoke to Mrs. Burkich, following Heard's night visit to her home and she was scared to death that Heard would com back and do something to her and the kids.
11. There were several people who knew about Heard's accusations and threats against Dr. Burkich, as well as his attempts to intimidate the Burkich family.
12. When I learned that Dr. Burkich was being charged in connection with the Corvette, I knew that Heard's threats to send him to the penitentiary had been more than loose talk.
13. A couple of days prior to Dr. Burkich's plea-change hearing, I accompanied him to the office of his attorney, and I heard him tell Attorney Summers that there was no way that he wanted to plea guilty.
14. I was also present at Court on the day that Dr. Burkich changed his plea to "guilty." His wife was absolutely furious over his change of plea, and I know that pleading guilty was not what Dr. Burkich wanted.

Further Affiant Sayeth Naught.

STATE OF TENNESSEE)
) SS:
COUNTY OF BRADLEY)

/s/ Woodrow F. Brank
WOODROW F. BRANK-AFFIANT
285 Charles Circle
Cleveland, TN. 37323

Subscribed and sworn to before me by Woodrow F. Brank, Affiant, as his "Affidavit," this the 9th day of May, 2004.

/s/ Wanda W. Thompson
NOTARY PUBLIC – STATE AT LARGE

My Commission expires: 12/31/04

FILE # 194C-AT-92266 TAPE #

DATE: 03/26/2001 Time: 11:20 A.M.

TYPED BY: clc(from Agent's rough draft)

TRANSCIRT OF CONVERSATION BETWEEN CI AND DR. ROBERT BURKICH (RB).

CI MEETS WITH DR. BURKICH TO PAY BURKICH $1,000.00 FOR THE 1997 CORVETTE.

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1 CI (INAUDIBLE)
GO TO THE MALL (INAUDIBLE)

2 RB YOU TELL ME WHAT'S BEST FOR YOU.

3 CI GO TO THE MALL ANYTIME, RIGHT NOW
4 (INAUDIBLE) THOUSAND DOLLARS.

5 RB WELL UH (INAUDIBLE)

6 CI YOU WON'T HAVE ANY PROBLEM WITH
7 THAT (INAUDIBLE) THEY GOTTA ORDER
8 THE DAMN THING (INAUDIBLE) WHAT
I'D DO, IT WAS RUNNING HOT, COOLANT

9 CI WAS LOW, GO TO THE MALL, SOMWHERE DIFFERENT (INAUDIBLE)

10 RB I GOT YA, I SEE WHAT YOU'RE SAYING, I GOT YA.

11 CI (INAUDIBLE) I HAD A PROBLEM WITH GETTING IT IN WHERE THE GATES WERE
12 LOCKED (INAUDIBLE) IT'S DONE NOW...

13 RB OKAY.

14 CI ...NO ONE WILL EVER SEE IT AGAIN.

15 RB OKAY, ALRIGHT, SO WE'RE ALL SET.

CI (INAUDIBLE)

RB OKAY, SOUNDS GOOD, WHAT I SHOULD DO IS, SHOULD DRIVE THE NAVIGATOR OVER TO THE MALL, AND SAY THAT....

CI WHAT I WOULD (INAUDIBLE) DRIVE THE NAVIGATOR, PARK IT ON A DIFFERENT SIDE, WALK THROUGH THE MALL...

RB RIGHT...

CI ...AND THEN COME OUT, DANG, YOUR CAR'S GONE, YA KNOW, YOU GET ON THE PHONE, ACTIVATE THE POLICE REPORT.

RB WHAT DO I SAY ABOUT...

CI ...WELL YOU UH, (INAUDIBLE) DON'T WORRY ABOUT IT, YOU'RE A DOCTOR, (INAUDIBLE) I DROPPED IT THERE (INAUDIBLE) MALL AND GET IN YOUR CAR, GET IN YOUR NAVIGATOR, AND GO ABOUT YOUR BUSINESS (INAUDIBLE)

RB OKAY.

15 CI DONE.

16 RB SO, ALRIGHT THEN WHAT I'LL DO (INAUDIBLE) TODAY.

17 CI TODAY IS GOOD, ANYTIME, YOU'RE GOOD TO GO. I'D GET IT ON, YA KNOW,
18 THE QUICKER YOU CAN GET A REPORT MADE THE QUICKER YOU'LL GET A
19 CHECK FOR THE CAR.

20 (CONTINUES)

21 RB ...IN OTHER WORDS, IF THEY ASK ME WHO'S DRIVEN THE CAR...

22 CI NO,NO NO DON'T YOU MENTION MY NAME, I AM A NOTORIOUS CAR THIEF.
23 I MEAN, DARREN CAN TELL YA (INAUDIBLE) CORVETTES AND

CI I CUT 'EM UP, FIX 'EM (INAUDIBLE) THAT'S MY JOB, YOU'RE A DOCTOR, I'M A CAR THIEF.

RB SOUNDS GOOD, NOW THAT CAR (INAUDIBLE) MY PARTNER...

CI FRED BAYNE, THAT'S WHY IT HAD THE BRADLEY COUNTY TAGS ON IT ?

RB EXACTLY.

CI WHO'S GONNA GET THE INSURANCE CHECK ?

RB HE'LL GET THE INSURANCE CHECK AND THEN HE'LL TURN IT OVER TO ME.

CI OKAY.

RB IF HE DOESN'T TURN IT OVER ME, NO PROBLEM.

CI (INAUDIBLE) (POSSIBLY "WE'LL HAVE TO KILL HIM")

RB (INAUDIBLE) YA KNOW I'LL GET THE MONEY.

RB CONVERSATION CONTINUES WITH CI AND DR. BURKICH EXCHANGING PHONE NUMBERS. CI ALSO INQUIRES ABOUT THE AVAILABILITY OF THE DOCTOR'S NAVIGATOR AND A FORD EXPLORER.)

RB CAN YOU GIVE ME A COUPLE OF DAYS?

CI SURE.

RB OKAY. GIVE ME A COUPLE OF DAYS.

(END OF TRANSCRIPTION)

39-11-504. Duress

(a) Duress is a defense to prosecution where the person or a third person is threatened with harm, which is present, imminent, impending, and of such a nature to induce a well-grounded apprehension of death or serious bodily injury if the act is not done. The threatened harm must be continuous throughout the time the act is being committed, and must be one from which the person cannot withdraw in safety. Further, the desirability and urgency of avoiding the harm must clearly outweigh, according to ordinary standards of reasonableness, the harm sought to be prevented by the law proscribing the conduct.

(b) This defense is unavailable to a person who intentionally, knowingly, or recklessly becomes involved in a situation in which it was probable that the person would be subjected to compulsion.

39-11-505. Entrapment.

It is a defense to prosecution that law enforcement officials, acting either directly or though an agent, induced or persuaded an otherwise unwilling person to commit an unlawful act when the person was not predisposed to do so. If a defendant intends to rely on the defense of entrapment, the defendant shall give to the district attorney general a notice comparable to that required for an insanity defense under Rule 12.2 of the Tennessee Rules of Criminal Procedure.

[Acts 1989, ch. 591, § 1.]

APPENDIX M
(PAGE 58)